Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

C. C. KILGORE, ET AL.,

Petitioners,

v.

BLACK STONE OIL CO., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioners denied due process of law when Texas courts allowed Petitioners' fee simple interest in property to be destroyed by summarily applying a finding of fact in a prior lawsuit, with which Petitioners had no privity and no representation and of which Petitioners had no notice?

2. Were Petitioners denied due process of law when the finding of fact in the prior lawsuit was used, through an issue-preclusion device called "unorthodox" *stare decisis*, summarily to destroy Petitioners' property rights and to deprive Petitioners of an opportunity to be heard on their facts?

3. Were Petitioners denied due process of law by the refusal of the courts of Texas to consider Petitioners' fundamental constitutional claims, thereby allowing Petitioners' property rights to be destroyed and denying to Petitioners an opportunity to be heard?

PARTIES TO THE PROCEEDING

Because of the large numbers of both Petitioners and Respondents, separate lists of the parties are included in the Appendix (App. D, *infra*).

There are no corporations among the Petitioners to which Rule 29.6 applies.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, C.C. Kilgore, et al., petition for the issuance of a writ of certiorari to the Supreme Court of Texas, as follows:

OPINIONS BELOW

The opinion of the Ninth Court of Appeals of Texas (App. A, *infra*), styled *C.C. Kilgore, et al. v. Black Stone Oil Co., et al.*, is reported at 15 S.W.3d 666. The orders of the Supreme Court of Texas denying discretionary review (App. B, *infra*) and denying Petitioners' Motion for Rehearing (App. C, *infra*) were not reported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Ninth Court of Appeals of Texas were entered on April 27, 2000. Petitioners' Petition for Review was filed in the Supreme Court of Texas on June 12, 2000. The order of the Supreme Court of Texas denying Petitioners' Petition for Review was entered on January 11, 2001. Petitioners timely filed their Motion for Rehearing in the Supreme Court of Texas, which was denied by the Court by order entered on April 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS INVOKED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in part:

> " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

Petitioners' predecessors, undisputed owners of the mineral estate of an approximately 4,000 acre tract of land, were not parties in a 1915 suit in which a jury determined on disputed evidence that the surface estate of that tract did not conflict with another tract. The mineral owners were not in privity with and were not represented by any party in the 1915 suit and there is no evidence that the mineral owners had any notice of the 1915 suit. When Petitioners sued to locate their mineral estate (this case), the courts of Texas held that the 1915 suit was *stare decisis* of the location issue based on the 1915 jury finding, thereby depriving Petitioners of their property.

A summary judgment was entered against Petitioners in this case, and sustained by the appellate courts of Texas, based solely on the alleged *stare decisis* effect of the 1915 fact-finding. Petitioners thus have not had an opportunity to be heard on their facts.

The surface estate of the tract in question, the Bartolo Escobeda League, originally surveyed in 1835, was severed from the mineral estate in deeds conveying the

surface, but reserving the minerals, executed by Petitioners' predecessors between 1902 and 1907. The two separate chains of title have remained separate since then, as, in effect, two distinct tracts of land,[1] and Petitioners have succeeded to the ownership of the mineral estate.

Petitioners sued the Respondents for conversion of oil and gas (as personalty) claimed by Petitioners to have been produced from the Escobeda mineral estate, seeking damages conservatively estimated in the hundreds of millions of dollars. Respondents claimed the right to produce the oil and gas based on agreements with the owners of the tract with which the Escobeda surface estate was found not to conflict in the 1915 suit. Respondents further asserted as an affirmative defense the claim that the 1915 surface finding was *stare decisis* of the location issue as to the separate mineral estate.

Petitioners invoked their constitutional right to due process of law at each level of the proceedings below, stating that to bind them to a fact-finding without notice, without privity and without representation would clearly deprive them of that fundamental right. Petitioners raised the due process issue in their response to the Respondents' motion for summary judgment in the trial court (App. E, *infra*), in their Appellants' Brief in the Ninth Court of Appeals (App. F, *infra*), in their Petition for

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[1] The law in Texas is that a horizontal severance of the mineral estate from the surface estate creates two separate legal estates, each with all of the attributes of title. *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1983); *Atlantic Ref. Co. v. Noel*, 443 S.W.2d 35, 40 (Tex. 1968).

Review in the Supreme Court of Texas (App. G, *infra*), in their Brief on the Merits (App. H, *infra*) and in their Motion for Rehearing in the latter court (App. I, *infra*).

None of the Texas courts addressed the clear constitutional issue raised by Petitioners.

It is undisputed that the 1915 case, affirmed on appeal in *W.T. Carter & Bro. v. Collins*, 192 S.W. 316 (Tex. Civ. App. – Beaumont, 1916, writ ref'd) (App. J, *infra*) involved only the determination of a fact question and did not involve or establish a principle of law on which to base *stare decisis*.[2]

REASONS FOR GRANTING THE WRIT

The decision by the Texas Court of Appeals in this case, which the Texas Supreme Court refused to review, is based upon the application of a doctrine, apparently unique to Texas, called "unorthodox" *stare decisis*. It allows parties in subsequent cases to be bound by fact-

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[2] The operative language of the *Collins* opinion is the following:

> "The ultimate effect of these assignments is to raise the question that the verdict of the jury on the issues of boundary is not supported by the evidence and that the charge of the court . . . is not sustained by the facts of the case . . . " 192 S.W. at 317. "These were all issues for the jury to determine from the evidence submitted to them, and, having determined them adversely to appellants, and their findings being amply supported by the evidence, it is not the province of this court to disturb them." 192 S.W. at 321.

findings in an earlier case, even when the later parties had no connection with the earlier suit. The court in this case recognized (15 S.W.3d at 667-68, *See* App. J, *infra*) that the *Collins* case did not support "orthodox" *stare decisis* (because *Collins* did not involve a principle of law) when the court chose to give binding effect to the *Collins* finding of fact. That choice did to Petitioners' mineral title what collateral estoppel could not have done: bind Petitioners by a finding of fact without privity. By attaching *stare decisis* effect to a finding of fact, the court of appeals made "unorthodox" *stare decisis*, like collateral estoppel, an issue-preclusion defense. In so doing, the court summarily disposed of Petitioners' mineral title.

However, because it applies without privity, "unorthodox" *stare decisis, i.e., stare decisis* based upon a fact-finding rather than a principle of law, on its face violates Petitioners' fundamental right to due process of law. A fact-finding in a case with which a present party has no privity, and in which he was not represented and of which he had no notice, cannot be binding on him. Further, no legitimate state interest, such as the alleged security of land titles, can rise to a level sufficient to overcome those elemental requirements of due process of law.[3]

The courts of Texas, by not addressing the constitutional issue posed sharply by the facts of this case, decided either that Petitioners have no due process right

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[3] It is worth noting that because the owners of the Escobeda minerals were not parties, the *Collins* fact-finding affected only the surface title. Thus, the "security of land titles" supported by *Collins* could only be as to the surface title, and could have no effect on the severed mineral title now owned by Petitioners.

to protect or that Petitioners' right to due process was not infringed in the circumstances presented here. The former alternative is demonstratively improper because Petitioners are the acknowledged fee simple owners of the Escobeda mineral estate, a real property interest which cannot be destroyed by state action without due process of law. *See, e.g., Buchanan v. Worley*, 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149 (1917).

The decision made by the courts below, including the Texas Supreme Court by its denial of review, is therefore that Petitioners were not deprived of due process, even though they have lost their property without the opportunity to protect it. That decision, that a fact-finding is binding on strangers to the first suit, conflicts with decisions of this Court.

The issue is whether the loss of property rights by the effect of judicial proceedings, in the absence of notice, privity and representation, violates the property owners' fundamental right to due process of law. This Court has addressed that issue and answered the question in the affirmative in many cases, among them *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453, 74 L.Ed. 1107 (1930); *Hansberry v. Lee*, 311 U.S. 32, 40-41, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940); *Blonder-Tongue Lab. Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323, 332, 99 S.Ct. 645, 650, 58 L.Ed.2d 522 (1979); *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996); and most recently in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167, 119 S.Ct. 1180, 1185, 143 L.Ed.2d 258 (1999).

The constitutional thesis of the above cases – the touchstone of due process in this context – is that strangers to the earlier case cannot be bound by the earlier judgment. As stated in *Richards*, quoting from *Hansberry v. Lee*, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 517 U.S. at 798. The effect of the judicial proceedings here is to invoke an issue-preclusion doctrine (at the behest of Respondents) to prevent Petitioners from having a jury trial on their facts, which are different from, and more compelling than, the evidence considered in 1915.[4]

Issue-preclusion doctrines, however, can run afoul of the requirements of due process. For example, this Court has examined "extreme applications of the doctrine of res judicata" to determine whether they are inconsistent with "a federal right that is 'fundamental in character.' " *Richards*, 517 U.S. at 797, quoting from *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 38 S.Ct. 566, 62 L.Ed. 1215 (1918). *Postal Telegraph*, in turn, relies on the familiar and fundamental principles of due process enunciated in *Pennoyer v. Neff*, 95 U.S. 714, 733, 24 L.Ed. 565 (1877), that a judgment may not be enforced against a person, even if he was named in the suit, without an opportunity to be heard. Petitioners' predecessors were not named in the

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[4] Petitioners located and presented as summary judgment evidence in this suit surveying information which predated the evidence in the 1915 suit, and which was not considered in the trial of that case.

1915 suit, yet a trial of Petitioners' location issue is being precluded, without a hearing, by the courts of Texas.

The holdings of this Court establish beyond question that the use of either res judicata or collateral estoppel to bind a litigant in a later suit depends upon either privity or representation – privity with the earlier litigants or effective representation by the earlier litigants. *See Richards; South Central Bell.* This case falls precisely within those holdings because the use of *stare decisis* based upon a fact determined in the 1915 case is the functional equivalent of collateral estoppel. Thus, without notice, without privity and without representation, Respondents have sought to bind Petitioners by the "do not conflict" fact-finding in the 1915 case. Since the establishment of Petitioners' ownership of the produced minerals depends upon proof of their location, the action by the courts of Texas sustaining Respondents' *stare decisis* defense destroys Petitioners' property rights in the mineral estate. Without question, that is "state action" within the prohibitive restriction of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948).

The Court's recent holding in *South Central Bell* confirms that if privity and some sort of special relationship are absent, an issue-preclusion defense "is inconsistent with *Richards* and with the Fourteenth Amendment's due process guarantee." 526 U.S. at 168. There is no privity and no special relationship here.

Without question, Petitioners have not been given an opportunity to be heard. That opportunity is the *sine qua non* of due process. *Armstrong v. Manzo*, 380 U.S. 545, 552,

85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (an opportunity to be heard must be given "at a meaningful time and in a meaningful manner."); *Mathews v. Eldridge*, 424 U.S. 319, 349, 96 S.Ct. 893, 909, 47 L.Ed.2d 18 (1976) (due process requires "notice of the case . . . and an opportunity to meet it"); *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 652, 58 L.Ed.2d 552 (1979) (parties must be afforded a "full and fair" opportunity to litigate their claims); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, 1897, 72 L.Ed.2d 262 (1982) (collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue). Neither Petitioners nor their predecessor owners of the Escobeda mineral estate have been given an opportunity to prove the location of their property.

The decision by the Texas Supreme Court to deny review of Petitioners' constitutional claim is a denial of their claim. That denial cannot be squared with the Fourteenth Amendment's due process guarantee. This Court has stepped in many times to correct failures by state courts to give effect to that guarantee. (See, e.g., *South Central Bell; Richards; Hansberry; Brinkerhoff*). The courts of Texas, by failing to allow Petitioners an opportunity to be heard, and by allowing Petitioners' property interests in the Escobeda minerals to be destroyed by a fact-finding to which Petitioners were strangers, have denied to Petitioners the due process of law to which the United States Constitution guarantees them.

CONCLUSION

To review this important question of federal constitutional law, the Court should grant the petition for writ of certiorari, for which Petitioners pray.

Respectfully submitted,

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